



Liability and Insurance

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By Jesse J. Richardson, Jr.

This booklet presents an overview of the principles of legal liability related to personal injury or property damage resulting from farm activities. The discussion omits liability from contracts, environmental laws and other sources to focus primarily on risks that may be covered by a liability insurance policy. Products liability law forms a particular interest. This area of liability poses an increasing risk of high levels of liability.

Introduction

Farming and agribusiness involve high levels of risk with respect to legal liability. Many accidents occur in the business of agriculture involving operators and employees. Traditional agriculture involved production of crops, raising of livestock and, perhaps, sale of products raised on the farm through road side stands. The basic farm liability insurance policy reflects this traditional view of agriculture.

In recent years, however, farm operations have expanded to include pick-your-own, corn mazes, haunted houses, and farm markets selling a wide variety of products from suppliers all around the country, and more. The increased use of these agri-tourism and agri-tainment activities brings members of the public onto farm property and raises the risk and consequences of accidents.

This booklet presents an overview of the principles of legal liability related to personal injury or property damage resulting from farm activities. The discussion omits liability from contracts, environmental laws and other sources to focus primarily on risks that may be covered by a liability insurance policy. Products liability law forms a particular interest. This area of liability poses an increasing risk of high levels of liability.

The focus then turns on ways to minimize the risk of claims. Proactive tools provide the best means of liability protection. However, even these steps fail to guarantee elimination of legal liability. Therefore, this booklet describes liability insurance in some detail. He examines covered activities, exclusions and special areas of concern. However, a booklet of this type cannot cover these complex topics in any significant detail. Instead the author seeks to give a broad overview of the subjects. The reader should consult with his attorney and insurance agent for more details and to apply these concepts to a particular operation.

General Liability Principles

Farmers and agribusinesses face legal liability on several fronts. If a farmer breaches a contract or violates an environmental law, for example, civil liability may attach. In the case of environmental laws, criminal liability may also apply.

This booklet focuses mainly upon civil liability for “torts” and insurance to address this liability. Civil liability refers to private rights and remedies, contrasted with criminal liability. The term “tort” refers to a private or civil wrong other than a breach of contract. An automobile accident caused by a careless driver is an example of a tort.

Civil liability results when a farmer acts wrongfully or fails to perform a legal duty if the conduct invades another’s legal rights. Liability may be based on negligent acts, intentional acts or strict liability. Negligence occurs when a farmer does something that a reasonable person would not do or fails to do something that a reasonable person would do. Liability ensues where the farmer holds a duty to protect another against unreasonable risks, the farmer breaches this duty and the breach causes damages to another. If a farmer fails to use due care in keeping the public area of a farm market clear by, not periodically clearing and cleaning the floor, for example, the farmer acts negligently. If a customer incurs injury do to this inaction, the farmer may be liable for the injuries. Intentional acts involve purposeful conduct, such as the intentional tearing down of a fence. Finally, the law sometimes imposes liability without regard to fault. Strict liability arises where personal injuries or property damage are caused by these activities, sometimes called “ultra haz-

ardous activities.” These activities include, in certain states, aerial chemical crop spraying, trespass by farm animals and defective products. A farmer in Virginia conducting blasting activities is strictly liable for injuries to another.

Products Liability

One form of civil liability is products liability. Products liability law refers to the legal liability for personal injuries and property damage caused by defective products. Either the user of the product or others affected by the use of the product may file suit. For example, Paula Producer sells produce to Harry Homemaker. Harry Homemaker prepares and serves the food, infected with a pathogen, to his family and friends. Paula is potentially liable to Harry, his family members and his friends for personal injury and property damage. In addition, potential liability attaches to every enterprise in the chain of supplying a product to market, including the producer, wholesaler and retailer.

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Three factors make products liability an increasing concern to agricultural producers in Virginia. First, the number of claims and lawsuits in products liability generally has grown significantly in recent years. Second, injured parties increasingly receive large amounts of compensation in these cases, through either court judgments or settlements. Finally, the marked increase in the number of Virginia operations that include farm markets and other direct sales of farm products exposes producers to higher risk. Whether the food products provided are produced on the farm or are purchased from suppliers, farmers face liability. Many producers now process and package products for direct sale, further increasing potential liability.

In Virginia, two main grounds of products liability exist: (1) negligence; and, (2) breach of implied warranty. Virginia courts and the General Assembly thus far have refused to join the majority of states in applying strict liability in these cases. Under either theory, the law deems products defective if unreasonably dangerous because of a defect in assembly or production, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning hazardous properties.

A person wishing to recover under negligence must prove that the producer or seller failed to exercise reasonable care in producing or marketing the product, resulting in an unreasonably dangerous product. If the consumer failed to exercise due care in using the product, contributory negligence exists. In Virginia, unlike almost every other state, contributory negligence prevents the consumer from recovering any amount for personal injury or property damage. Consumers may also use warranties to file suit for products liability. A warranty is a representation or statement as to the quality or characteristics of a product. State laws or court opinions impose “implied warranties,” or unspoken statements, in certain situations. Three types of implied warranties attach to sales of products in Virginia. In any situation, a seller warrants that the product is fit for the ordinary purposes for which it is used. If a seller knows the purpose for which the products will be used and the buyer relies on the seller’s skill or judgment in selecting or furnishing goods, then the seller impliedly warrants the fitness of the product for the particular purposes intended. Finally, Virginia courts hold that sellers of food products warrant its wholesomeness.

Past agricultural implied warranty cases focused on the sale of animals, semen, seeds and the like. For example, if a farmer sells another farmer a bull to be used for breeding and the bull is not fit for breeding, the buyer may hold the seller liable for breaches of implied warranties of merchantability and fitness for a particular purpose. However, future cases will increasingly address warranties of food or produce purchased by consumers.

Operators that sell food products to consumers should familiarize themselves with the general principles of products liability. As with liability in general, proactive safety measures provide the best protection. Food, meat or produce containing foreign substances (hair, glass, bones, etc.) or contaminated with bacteria or pathogens subject the farmer to liability.

An Ounce of Prevention is Worth a Pound of Cure

The best, and least costly, method to reduce exposure to liability is to engage in a proactive safety program to protect employees, customers and others. The following list sets out general steps that every operation should undertake to minimize exposure to risk from civil liability. The list is not intended to be exhaustive and each operator should consult with his or her attorney, insurance agent, and other advisors to tailor a program to their operation.

- 1) Develop a proactive liability audit program. Watching for possible problems should be part of every employee's job.
- 2) Develop a safety routine for your facility and stick to that routine. Provide checklists for employees to ensure that corridors are clear, hazards are prevented, etc. Make safety a key word every day.
- 3) Use contracts to clarify rights and responsibilities. Contracts with suppliers and customers, where appropriate, can limit liability.
- 4) Use release of liability forms.
- 5) Use safety latches and locks to secure areas not open to the public, remove keys from tractors and other equipment, and keep dangerous items out of reach of the public.
- 6) Keep walkways, aisles, driveways, etc. clean and free clear of obstacles, snow, ice, etc.
- 7) Post signs (with pictures) to warn customers of potential risks and hazards.
- 8) Set up your facility specifically for your activity.
- 9) Minimize or eliminate contact between animals and customers.
- 10) Use equipment appropriate to your activity.
- 11) Develop the proper appropriate business entity. (Limited Liability Company, Sole Proprietor, Partnership, etc.)
- 12) Never say you are sorry, but treat accident victims kindly, efficiently and with care.
- 13) Obtain adequate liability insurance.

The purchase of an insurance policy generally serves to shift at least a portion of the financial risk of certain losses to the insurance company. Liability insurance refers the coverage for injury to another person or damage to another person's property for which you are legally responsible.

Liability Insurance

One may address risk in four different ways: avoid it, reduce it, accept it, or transfer it to another party, namely an insurance company. Most businesses choose to transfer at least a portion of the risk to an insurance company. However, insurance companies are not required to accept any risk. The greater the risk, the greater the cost of the policy. Occasionally, a risk is too great even for an insurance company to bear. In these cases, the farmer can best avoid any financial risk of loss by abstaining from that activity altogether.

The purchase of an insurance policy generally serves to shift at least a portion of the financial risk of certain losses to the insurance company. Liability insurance refers to coverage for injury to another person or damage to another person's property for which you are legally responsible. In today's business world, virtually every business should be covered by a liability insurance policy. The alternative to purchasing liability insurance is to "self-insure" for liability losses. Self-insuring involves retaining sufficient case reserves to pay for the defense of claims, and to pay valid claims. Given the cost of litigation and the possibility of judgments in the hundreds of thousands of dollars, most businesses find it more feasible to purchase a liability insurance policy.

An insurance policy is a contract between the insurance company and the insured. The purchase of a policy essentially shifts certain financial risks of loss from the insured to the insurance company.

The Farmers Comprehensive Personal Liability Policy

One step in your liability minimization plan involves obtaining adequate liability insurance. The Farmers Comprehensive Personal Liability Policy (hereinafter the FCPL policy) is a particular form of liability insurance policy. Most farmers use the FCPL policy and its provisions seek to meet the particular needs of farmers. This section discusses the common provisions of the FCPL policy in Virginia, points out common shortfalls in the policy for farm operations, and suggests steps to ensure that a farmer's policy protects against applicable risks.

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Obligations of the Insurance Company

Duty to indemnify

The insurance company agrees to pay for bodily injury and property damage arising from covered activities. Policy limits set the boundaries for this liability. For example, if a farmer holds a \$500,000 liability insurance policy and an injured party obtains a \$750,000 judgment against the farmer for a covered activity, the farmer remains personally liable for the \$250,000 excess judgment.

Duty to defend

The insurance company additionally agrees to defend, at its expense, the insured in lawsuit brought by a third party relating to a covered risk. The company will choose and pay the attorney. However, the attorney represents the insured, not the insurance company.

Some insurance policies provide that the cost of defending a lawsuit reduces the limits of liability. For example, a farmer has a policy with limits of liability of \$250,000 per occurrence and \$1,000,000 total. The company defends a lawsuit against the farmer at a cost of \$50,000. The farmer now holds coverage for \$200,000 for that particular incident and \$950,000 total.

The company normally holds the right to settle the case on the insured's behalf. Therefore, even if you wish to go to trial, the insurance company can settle the claim. In cases where the injured party asks for more than policy limits, the company may pay the total limit of liability and not defend the case. Using the information from the above example, if the injured party sued for \$1 million, the company may pay the injured party \$250,000 and then have no further obligations in the case. Note, however, that the payment of a settlement amount less than policy limits also absolves the policyholder from further liability. The company may also pay the full amount of policy limits and leave the policyholder, at its expense, to defend against any further recovery.

Obligations of the Insured

Duty to Pay Premiums

The insurance company may be relieved of its duties if the farmer fails to live up to his promises. Failure to pay premiums on time results in loss of coverage.

Duty to Cooperate

The insured must promptly notify the company of accidents or incidents that may result in liability claims. Additionally, the insured must cooperate fully in the investigation and defense of the case, including giving statements, appearing at trial and participating in settlement negotiations. Failure to cooperate results in losing coverage for that incident.

Duty of Disclosure

Farmers make certain representations when applying for an insurance policy. For example, the

agent, when completing the application for insurance, will ask about the type of operation. If the farmer states on his application that he grows crops on his land and an accident then occurs within the corn maze he operates, failure to disclose the existence of the corn maze may mean the insurance policy does not cover that activity.

Exclusions

In General

“What the large print giveth, the fine print taketh away.” Michael Olexa, University of Florida.

Perhaps the most important section of the insurance policy, and the part that all farmers should read carefully and understand, is the exclusions section. This section lists activities that the policy will not cover. Some of these excluded activities are discussed in the following section on specific farm activities. What follows lists some general exclusions from coverage, but not all exclusions in the standard policy.

Products liability

Many standard FCPL policies exclude products liability from coverage except for raw agricultural products. Processed products or products obtained from suppliers are not covered. Producers marketing and selling these products to consumers, or to retailers in situations where liability may attach, should consider adding products liability coverage to their policy. However, coverage may not be available to small producers. When available, the cost of such coverage often is prohibitive.

Policyholder and Family

Injuries to the policy holder or family members of the policyholder are normally excluded. In addition, if the policyholder damages its own property, coverage does not apply.

Business Activities other than Farming

Generally, activities other than farming are not covered. Farming includes the production of crops and raising of livestock. In addition, roadside stands and farm markets “maintained primarily for the sale of the insured’s own farm products” fall within the definition of “farming.” Any other activities should be discussed with your agent and specially addressed or they are not covered.

Activities that Raise Coverage Issues

Introduction

Whenever your business involves having members of the public on the property, insurers must analyze or review your operation for increased liability concerns. In addition, any activity on the property of others, outside of the property in the farming operation, or beyond normal “production” activity raises additional concerns. This section lists activities that frequently cause concern with respect to the FCPL. However, all activities should be fully disclosed to the insurance agent.

Custom Farm Work

Custom farm work for others may require an additional premium and amendment of the standard agreement. Alternatively, custom farm work where gross receipts for the year exceed a certain amount (for example, \$5,000) may require an additional premium and an amendment to the policy. The premium amount typically varies based on the amount of gross receipts. In any case, working for others off the insured farm site raises questions of additional liability and must be discussed with your agent.

All real estate owned or rented and that serves as part of the farm operation should be disclosed to your agent. Accidents occurring outside the real estate disclosed to your agent may not be covered.

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Additional discussion proves necessary when chemicals will be applied for others or offsite. Farmers should ensure that details of this activity are discussed with the agent.

Pollution

Protection from liability and suits relating to pollution issues generally fall outside of the FCPL. The policy covers “sudden releases” only. For example, the policy covers the damages for chemicals spilled as the result of a farm use truck crossing the highway and involved in an accident. However, the policy fails to cover damages from a leaking underground storage tank, or from dust or odors, that, over time, cause injury to others.

Most insurance carriers offer a separate policy to cover damages from pollution. However, the policy is very expensive and difficult to obtain. Insurers write few farm pollution policies in Virginia.

Horses

The standard farm policy insures against damages resulting from horse boarding on a small scale. However, liability from horse training, riding schools, trail riding or horse racing falls outside normal coverage. Persons boarding horses or engaging in horse activities should discuss the exact activities with their agent. Coverage for horse activities results in a relatively high premium. However, obtaining coverage is relatively easy.

Corn mazes or hay mazes

Corn mazes and hay mazes invite the public onto the property. Therefore, the farmer must examine each aspect of the operation to ensure safety. In addition, employees should constantly monitor the areas accessible to the public for safety concerns.

One concern involves fire. Is the area safe from fires started by discarded cigarettes or other accidents?

In addition, hay mazes raise concerns about falling bales. Climbing children exacerbate this concern. Heavy round bales increase the stakes in an accident. An out-of-state accident in a round bale hay maze resulted in the death of a twelve-year-old boy.

Public Contact with Animals

Public contact with farm or domestic animals on the farm increases the risk of lawsuits. One commonly thinks of the animal injuring the people on the property by biting, kicking or otherwise. However, another risk involves the public contracting and transmitting diseases from the animal. For example, a school visit to a farm in Pennsylvania where a school child went from a petting zoo to lunch without washing his hands resulted in an outbreak of *Escherichia coli* O157:H7 and a multi-million dollar lawsuit. Where petting zoos or activity results in human-animal interaction, sanitation stations should be provided and hand-washing enforced. Farmers should choose docile animals with little or no risk for aggressive behavior.

Sale of Processed Farm Products or Non-farm Products

The FCPL generally covers production activities and farm markets and roadside stands maintained principally for the sale of products produced on the farm. However, farm markets and roadside stands increasingly sell processed products (e.g., apple cider produced from the orchard's apples) and products from outside suppliers. These activities dramatically increase the chance of a products liability claim.

Injuries to Workers

The law exempts some small farm operations from obtaining workers' compensation insurance.

Most insurance carriers offer a separate policy to cover damages from pollution. However, the policy is very expensive and difficult to obtain. Insurers write few farm pollution policies in Virginia.

The standard farm liability insurance policy contains exclusions and exceptions, however, that can have dire consequences for the farm operation. One must always remember to fully disclose all activities and the extent of each activity to the insurance agent. If the farmer fails to disclose the activity, the activity may not be covered by the insurance policy.

For details on the exemption, contact your agent or attorney. Those exempt from workers' compensation receive coverage under the FCPL. However, deaths resulting from farm accidents may involve more than \$1 million in damages. If you have a \$1 million FCPL policy, your farm assets may be subject to judgments in those rare, but tragic, circumstances.

Exempt operators should consider obtaining workers' compensation coverage. Compare the cost of this coverage with the increased protection.

Fruit or Vegetable Picking by the Public

Again, the operator must protect the public by making the accessible areas safe. The FCPL fails to cover pick-your-own operations, but insurers offer relatively affordable coverage in most instances. However, use of ladders or off-ground picking raises the potential liability and makes coverage expensive and difficult to obtain.

Conclusion

Agriculture is risky business. Bringing members of the public onto the property increases the risk of accidents. Selling processed food products or products purchased from others increases exposure to products liability, an area of increasing importance in agriculture.

Farms and agribusinesses best protect themselves from liability by engaging in a proactive safety program. Safety must form an important part of the day-to-day business if the farm is to survive. But, sometimes accidents happen even in the safest of operations. In that case, the purchase of liability insurance allows the farmer to shift some of the financial risk of loss to an insurance company.

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Agri-tourism and agri-tainment activities may offer the promise of profitability to farm operations. These enterprises may be conducted profitably, despite liability concerns. However, safety must always be the primary concern of the operator. Contact your attorney and/or your insurance agent BEFORE you expand your operation to include these new activities.

Forms

The following pages contain some sample forms for a farm or agribusiness operation. The forms are examples only and should not be adopted "as is" or without consultation with your attorney and insurance agent. Forms 1 and 2 were adopted and modified from the Virginia Farm Bureau and Ricigliano, William, Premises Liability Claims: A Guide to Defending Owners, American Bar Association Section of Real Property, Probate and Trust Law (2003). Form 3 was adopted and modified from Ricigliano.

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Additionally, Mr. Richardson has made numerous presentations on legal and economic issues to lay and professional audiences across the country. His many publications include law review articles and papers published in professional proceedings. He received the 1999 American Agricultural Law Association Award of Excellence for Professional Scholarship and the 1999-2000 Certificate of Teaching Excellence from Virginia Tech. He serves on the Virginia Farmland Preservation Task Force.

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The listed entities and individuals, and many others, deserve much of the credit for this publication. However, any mistakes or imperfections in this document are solely those of the author. I sincerely hope that this publication will provide assistance to farms and agribusinesses in Virginia so that these operations may thrive and prosper.

FORM 1: ACCIDENT REPORT

Customer information

Name of injured person _____

Address _____

Phone _____

Date of accident ____/____/____, Date accident reported ____/____/____

Time of day, hour of injury _____AM___ PM ___

Location of accident _____

Who reported the accident? _____

Phone number _____

Describe fully nature of injury or illness. _____

Was medical attention ___denied___accepted___not applicable

If medical attention accepted, describe _____

Comments made by injured party _____

Detailed description of accident (describe and list all observations of importance, e.g., broken seat, exposed material, type of substance, high-heeled shoes on injured party, etc.) _____

Name, address and phone number of hospital if used,

FORM 1 (page 2)

Description of the Area of the Incident _____

Was dangerous condition observed? ____ Yes ____ No

If yes, describe the condition in detail _____

Photos taken by _____ Date & time taken _____

Can be contacted at _____

Were police or security called? ____ Yes ____ No (If yes, attach a copy of the report)

Time called _____ By whom? _____

Was police/security on duty at time of incident? ____ Yes ____ No

If security or police involved, describe nature of involvement _____

Was an ambulance called? ____ Yes ____ No

Names of ambulance attendants _____

Witness name _____

Full address _____

Home phone _____ Business phone _____

Witness is an employee ____ Yes ____ No

Witness's relationship to injured party _____

Comments made by witness (attach statement, if applicable) _____

Manager on duty _____

Accident reported to _____ Title _____

Signature of employee completing report _____

FORM 2: CHECKLIST OF QUESTIONS/OBSERVATIONS UPON INITIAL INSPECTION OF ACCIDENT SCENE

Observation of the accident location

Is there a condition present that may have caused the accident?
If so, can it be identified?

Are there any characteristics of the accident area itself that are unique?

- Odor • Footprints
- Sticky Substance(s) • Debris
- Dirt • Streaking

Where is the exact location of the accident?

What are the lighting conditions?

Is there an exposed, dangerous condition?

Were there any witnesses to the accident?

Take photographs of the accident scene (include date, time, and identity of photographer).

Observations/Inquiries of the Injured Person

What is the nature and extent of the person's injury?

Are his/her clothes wet?

What type of shoes is he/she wearing?

Where is the injury located on the body?

Do there appear to be any broken bones?

Is there swelling or discoloration?

Is any part of the person's body bleeding?

Does the person need immediate medical care?

Where was the person looking immediately prior to the occurrence?

Did the injured party see the alleged condition before he/she fell?

How does the injured person think the accident occurred?

Tips

- 1 Attend to the victim first and foremost; make sure relief comes quickly
- 2 Comfort victim until help arrives
- 3 Do not comment regarding fault
- 4 Get detailed information concerning the accident (see report form)
- 5 Report accident to your insurance carrier ASAP
- 6 Keep an accident log book on any accident/injuries that occur
- 7 Advise all of your employees how to handle accidents and report to management

FORM 3- INSPECTION REPORT

Area inspected: _____

Time: _____

Observations (do any obstructions or unsafe conditions exist? _____

Actions: (Check & denote time)

____ Mop time start_____ Time complete_____

____ Sweep time start_____ Time complete_____

____ Additional assistance requested

Identify individuals assisting _____

____ Drying agent applied_____ type_____

____ Wet Floor Signs Posted _____ time _____

____ Area Cordoned Off _____ time _____

____ Area Closed _____ time _____

Time inspection completed: _____

